Paint, Chemical, Clerical, Warehouse & Industrial Workers Union, Local 1310 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (Toledo Scale, a Division of Reliance Electric Company) ***and*** **Anthony Sorrentino.** Case 29-CB-4767

11 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 22 July 1983 Administrative Law Judge Winifred Morio issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As set forth more fully in the judge's decision, the Respondent's business agent, Edward Kmon, and two of the Respondent's shop stewards met with representatives of Toledo Scale, a Division of Reliance Electric Company (herein Toledo Scale) 19 February 1981 to discuss, inter alia, the reluctance of certain employees to attend training school. Following the meeting, Toledo Scale's regional manager, Bill Winter, sent Kmon a memo outlining the topics discussed by the parties at the meeting.[1] Kmon never responded to this memo.

Contrary to the judge, we find that, on these facts, the Respondent and Toledo Scale did not modify their collective-bargaining agreement. We find insufficient record evidence to support any finding of modification. Both Kmon and Winter testified that the agreement was not modified 19 February. As for Winter's memo, it is subject to too many conflicting interpretations as to what it represents[2] to sustain such a finding. Furthermore, unlike past contract negotiations, the 19 February meeting did not include the shop stewards from all unit locations; and unlike past contract agreements, the 19 February meeting did not produce any writing signed by Kmon and all the shop stewards on behalf of the Respondent, and ratified by the Respondent's members. Consequently, Business Agent Kmon's failure to respond to the memo does not establish a modification of the contract. To the contrary, Kmon's inaction is understandable in light of the circumstances and Toledo Scale's recognized authority under the collective-bargaining agreement to discipline or discharge employees.[3] In sum, we find that the Respondent and Toledo Scale did not modify their collective-bargaining agreement herein.[4] Accordingly, we reverse the judge's finding of a violation of Section 8(b)(1)(A) on this ground.

The judge also found that the Respondent violated its duty of fair representation under Section 8(b)(1)(A) by deliberately misleading the discharged employee, Anthony Sorrentino, as to his rights under the collective-bargaining agreement. The record shows that Sorrentino received a letter, on 21 August 1981, from Toledo Scale Official Sauser stating that a second refusal[5] to attend training school could result in disciplinary action up to and including discharge. It is undisputed that when Sorrentino told the Respondent's shop steward, Ward, about the letter, Ward replied, "They really can't fire you for that. You lose your seniority, but there is nothing that says they can fire a man for refusing to go to school." Ward was wrong. On 3 November 1981, relying on section 45[6] of the collective-bargaining agreement, Toledo Scale discharged Sorrentino for refusing to attend training school.

It is well settled that "negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the Act." *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446, 448 (1974). We recently reaffirmed that, as an element of the duty of fair representation, a union's agents must refrain from purposely keeping unit employees uninformed or misinformed concerning grievances or matters affecting employment. *Teamsters Local 282 (Transit-Mix Concrete)*, 267 NLRB

[1] The memo provided that:

1. After much discussion it was agreed that if no technicians would voluntarily sign the posted school announcement, that the technicians within that department with the least amount of schooling would be appointed to attend. 2. It was agreed where possible, that we would post the school 30 days in advance and advise the appointed technician one week in advance, prior to the start of the schooling. 3. If technicians still refuse to attend school, disciplinary action will be taken up to and including discharge.

[2] For example, it could be construed as a summary of the parties' discussion, an inartful attempt at a proposed modification, or a memorandum intended to reaffirm the parties' understanding of art. IV, sec. 14-B of the collective-bargaining agreement.

[3] Sec. 45 of the collective-bargaining agreement reads as follows:

The Company reserves full right to discharge any employee for dishonesty, insubordination, drunkenness, recklessness, doing outside work competitive to Company business, or any other just cause, subject to the provisions of this agreement.

[4] In view of our finding that the parties did not modify their agreement, we do not pass on whether such modification, coupled with the Union's failure to notify the unit members of the change, could constitute a violation of Sec. 8(b)(1)(A) of the Act.

[5] Sauser wrote the letter in response to Sorrentino's refusal to sign up for training school in August 1981.

[6] The text of sec. 45 is reproduced at fn. 3 above.

1130 (1983). Plainly put, unlike purposeful conduct, simple negligence does not violate the duty of fair representation under the Act.[7]

Although we find that the Respondent's shop steward, Ward, was negligent in his response to Sorrentino's question about the warning, we do not find sufficient evidence to establish that Ward's response was so arbitrary as to be "deliberate," as found by the judge. At most, we find Ward's response herein was simple negligence. Absent any stronger showing by the General Counsel, we do not find the Respondent, by shop steward Ward,[8] violated its duty of fair representation under the Act. Accordingly, we also reverse the judge's finding of an 8(b)(1)(A) violation on this ground.

ORDER

The complaint is dismissed.

[7] This approach is consistent with the "arbitrary, discriminatory or bad faith" language of *Vaca v. Sipes*, 386 U.S. 171 (1967).

[8] In light of our conclusion to dismiss the complaint, we do not reach the question of Ward's status as an agent for the Respondent.

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. This case was tried before me on January 20 and March 4, 1983, at Brooklyn, New York, pursuant to a complaint issued by the Regional Director for Region 29 on June 14, 1982, in the above-captioned case. The complaint, based on a charge filed by Anthony Sorrentino, an individual, against Paint, Chemical, Clerical, Warehouse & Industrial Workers Union, Local 1310 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (herein Union), alleges, in substance, that the Union and Toledo Scale, a Division of Reliance Electric Company (herein Toledo Scale or Company) were parties to a collective-bargaining agreement covering a unit of technicians, senior technicians, working supervisors, and trainees; that on or about February 19, 1981, the parties modified the collective-bargaining agreement to provide a penalty of discharge for employees in the unit who refused to attend a formal training program; that the Union failed to advise the employees in the unit of the aforesaid contract modification; that Robert Ward, an agent for the Union, advised Sorrentino that he could not be discharged for failing to attend the formal training program; that on November 2, 1981, Toledo Scale suspended Sorrentino and, thereafter, discharged him because he failed to attend the aforesaid program. The Union filed an answer wherein it denied the commission of the unfair labor practices as alleged.

All parties were given a full opportunity to participate in the proceeding, to cross-examine witnesses, to argue orally, and to file briefs.

On the entire record in the case, and my observation of the demeanor or the witnesses, and after careful consideration, I make the following

FINDINGS OF FACT

I. JURISDICTION

Toledo Scale is engaged in the manufacture, sale, distribution, and service of weights and measurement instruments. Toledo Scale, in the course and conduct of its business, purchased and caused to be transported and delivered to its place of business goods, supplies, and materials valued in excess of $50,000 of which goods, supplies, and materials valued in excess of $50,000 were delivered to its places of business in interstate commerce directly from States of the United States other than the State in which it is located. The parties admit, and I find, that Toledo Scale is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

Whether the collective-bargaining agreement in effect between Toledo Scale and the Union was modified.

Whether, assuming such a modification, the Union had a duty to notify the employees in the unit about the modification.

Whether, assuming there was a failure to notify employees in the unit, the Union violated Section 8(b)(1)(A) of the Act.

Whether Robert Ward was an agent of the Union when he made certain statements to Anthony Sorrentino.

Whether the statements made by Robert Ward to Anthony Sorrentino concerning the penalty to be imposed for failure to attend the formal training program were incorrect.

Whether, assuming that the statements made by Ward were incorrect, the Union failed to fulfill its obligations to Anthony Sorrentino and thereby violated Section 8(b)(1)(A) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The Union has been the certified collective-bargaining representative of the technicians, senior technicians, working supervisors, and trainees employed by Toledo Scale at its Mt. Vernon and Long Island City, New York locations and at its Fairfield, Totowa, and South River, New Jersey locations since September 1977. There have been two collective-bargaining agreements between the parties, the most recent agreement has been in effect since August 1980 and bears an expiration date of July 31, 1983. According to Edward Kmon, the Union's business agent, at each location there is a shop steward who is an employee. Kmon testified that it is the responsibility of the shop steward to handle the griev-

ances at his particular location during the initial stages and Kmon will participate in the grievance procedures at a later stage.[1] However, all shop stewards participate in the grievance procedures if a grievance at one location has the possibility of affecting conditions at the other locations. The shop stewards from all the locations also participate in the negotiations for the collective-bargaining agreement and they execute the final document after membership ratification. At the times involved herein, Robert Ward, a senior technician, was the shop steward at the Long Island City location. He had been a member of the team which negotiated the 1980–1983 agreement and he executed the document on behalf of the Union. Ward testified that he has interpreted the collective-bargaining agreement, on occasion, for the employees at his location.

It is undisputed that Toledo Scale has had an ongoing training program for its employees. Prior to the most recent collective-bargaining agreement with the Union, the Company assigned employees to attend these training programs without consultation with the Union. The most senior employees perceived this to be a disadvantage because the Company was selecting employees with less seniority to attend the school. In view of the fact that the Company, in the event of a layoff, could choose the employee with the greater skills, the more senior employees faced the prospect of layoff, notwithstanding their seniority. The Union, aware of these concerns, sought to resolve the matter in the negotiations for the 1980–1983 contract. Kmon testified that "we were successful in negotiating the contract there to say that the senior employee would get the first shot at any schooling coming up." The result of these successful negotiations was article IV, section 14–B.[2] The section provided that thereafter the selection of employees for the training program would be on the basis of seniority. In addition, section 14–B also states the following:

> It is further understood that Section 14 will not apply where posted records indicate that the employee has continually refused an opportunity for schooling. However, it is recognized that there may be occasional legitimate reasons for refusal. For the purposes of layoff and recall only, employees that continually refuse schooling without legitimate reason will be laid off in accordance with the provision of Section 15, should such a layoff become necessary.

In addition to this provision, the agreement also contains article XIV, section 45, under the general provisions. The clause reads as follows:

> The Company reserves full right to discharge any employee for dishonesty, insubordination, drunkenness, recklessness, doing outside work competitive to Company business, or any other just cause, subject to the provisions of this agreement.

Both Kmon and Bill Winter, the regional manager for Toledo Scale, testified that the part of section 14–B which related to a loss of seniority by employees who refused to attend school without providing a legitimate reason was inserted to induce employees to attend school. Winter stated that the clause concerning loss of seniority was included to be used as "leverage" in those situations where senior technicians refused to attend school without having a legitimate reason for their refusal. Kmon and Winter did not agree, however, as to whether the loss of seniority was meant to be a disciplinary measure for refusing to attend school. Kmon stated that it was not a disciplinary measure, it related only to seniority issues. Winter testified, "It had to do with discipline to people who don't understand with regard to schooling you had to go to school, and disciplinary action would be ultimately you could lose your seniority status." Winter, at another point in his testimony, in response to a question as to what the Company could do if it were faced with a situation where every employee refused to attend school responded, "Only what's in the contract, that they lose their seniority." Subsequently, he testified that if an employee continually refused to attend the school without giving a legitimate reason he would be terminated under the just cause provision of the contract.

On February 19, 1981, there was a meeting between representatives of the Company and the Union. The Company was represented by Bill Winter, the regional manager, and Richard Kowalski. The Union was represented by Kmon, John Malone and Joseph Auteri, the shop stewards, respectively, for the South River and Fairfield, New Jersey locations. Both Kmon and Winter, who were the only witnesses who testified about the February meeting, stated that the meeting was arranged to discuss several matters, including the reluctance of the technicians at the Fairfield location to attend the training school. Winter testified that the Company began to experience difficulties with the training program after the Company started to comply with section 14–B. It appears that the senior technicians who had been successful in securing the right to be selected first for the training program under the terms of section 14–B were reluctant to actually attend school when the opportunity was offered. This problem was discussed at the February 19, 1981 meeting. Subsequent to the meeting Winter drafted a memorandum outlining the topics discussed at the meeting and forwarded a copy to Kmon.[3] The memorandum covers several items including one that refers to the training program. According to the memorandum, the parties reached agreement with respect to which employee would be selected to attend school in the event that there were no volunteers; that school dates would be posted, if possible, 30 days in advance; the appointed technicians would be advised of the appointment 1 week prior to the start of school and technicians who refused

[1] G.C. Exh. 2. The collective-bargaining agreement, under art. III, sec. 4 provides that differences between the parties as to interpretation or application of the provisions of the agreement are subject to the grievance procedure. It also states that the shop steward, if requested by the employee, will participate in the initial stages of the grievance procedure.

[2] Art. IV deals with seniority matters.

[3] G.C. Exh. 5.

to attend school would be subject to disciplinary action up to and including discharge. Kmon did not respond when he received the memorandum which purported to outline what occurred at the meeting. The Union contends that this memorandum constitutes the Company's notations of what occurred at the meeting and, therefore, it was not incumbent on the Union to respond and it does not establish that agreement was reached, by the parties, on any item contained in the document.

The document refers to several matters, including the item relating to the training program. In referring to some items the word "discussed" is used. For example, that word is used in connection with the item referring to the transfer of employees (item B) and the item referring to the appointment of "Toledo Authorized Distributor" (item E). However, with respect to matters relating to industrial products (item C) and the training program (item D) the memorandum utilizes language which reflects that the parties had reached an agreement with respect to those issues. Despite the use of the word "agreement," Winter denied that any new agreement had been reached about the training program. Rather, he contended that the Company always had the authority to discharge an employee who continually refused to attend school and failed to provide a legitimate reason for that refusal, under section 45 of collective-bagaining agreement. He was unable to explain, satisfactorily, why, therefore, there was a need for additional language in the memorandum concerning the Company's right to discharge. The document does not refer either to section 45 or to the Company's authority under that section to discharge an employee for refusing to attend the training program. In addition, Winter admitted that the 1981–1983 contract had not required the Company to post the dates for the school program at any specific time, although the Union had sought such a time requirement during the negotiations. Winter testified that was one of the dissatisfactions expressed by the employees prior to the February 19, 1981 meeting and it was discussed at the meeting and the memorandum reflects that agreement was reached on that issue. Winter testified about that matter as follows, "One thing came up about the fact we posted schooling, and they said fine, a week or two notice is not sufficient. We want more time. I said, fine. That's something we will do. We will try and give it out thirty days ahead of time wherever possible."

It is this document which the General Counsel asserts sets forth the modification of the contract, i.e., the penalty for refusing to attend school without a legitimate reason now was discharge rather than a loss of seniority in the event of a layoff. In view of the fact that the Union's position is that there was no modification, it is conceded that the Union did not notify employees in the unit about the minutes of the February 19, 1981 meeting with respects to the training school.

In early March 1981 Winter held his usual quarterly meeting with the employees during which there was general discussion about several matters, including the need for the technicians to attend school. Winter testified that at this meeting he advised the the technicians that, if they refused to attend school, disciplinary action could be taken "up to and including discharge."[4] Winter did not recall making that statement to the employees at any point before or after the execution of the contract in August 1980. He claimed he made that announcement in March 1981 because of general "grumbling" by the employees about attending school.

Anthony Sorrentino had been employed from November 1962 until his discharge on November 3, 1981. He was discharged at that time because he failed to provide a legitimate reason for his refusal to attend school. At the time of his discharge Sorrentino was classified as a senior service technician and worked out of the Long Island City location. According to Sorrentino, prior to August 1980 he had attended the Company's training school on three or four occasions and he had refused to attend on two occasions about 4 or 5 years prior to the events in the instant case. At the time of those earlier refusals he had not been reprimanded. In August 1981 a notice was posted on the bulletin board advising all service technicians that they had to attend school and Sorrentino's name was included on the list. However, Sorrentino marked on this notice that he would not attend and he noted that he was refusing to do so for "personal reasons." He did not elaborate further on his reasons. On August 21, 1981, Sorrentino received a letter from Michael Sauser, the service manager, in which he was advised that his refusal to attend school, without a legitimate reason, was a major offense. The letter further stated that he was to consider this notification to be a warning and that a second refusal to attend training school could result in disciplinary action "up to and including discharge."[5] At the same time that Sauser handed him the warning he also gave him a copy of the contract. Sorrentino spoke with Sauser and he then decided to attend school and he made a note to that effect on the notice posted on the bulletin board. Subsequent to this conversation with Sauser, Sorrentino spoke with Ward, the shop steward, about the matter. He showed the letter of August 21, 1981, to Ward together with the contract. Both Sorrentino and Ward are in agreement that Ward told Sorrentino that the letter was incorrect, that the only thing that could happen was that he would lose his seniority in the event of a layoff. Thus, Ward testified, that he told Sorrentino, "they really can't fire you for that. You lose your seniority, but there is nothing that says they can fire a man for refusing to go to school."[6] Sorrentino did not file a grievance with respect to this warning, he claims, because of Ward's statement to him that the letter was incorrect.

It is undisputed that Sorrentino was scheduled to attend school commencing on November 1, 1981, and that all the arrangements had been made for his attendance by the Company prior thereto. Sorrentino, however, did not attend school as scheduled but on Monday,

[4] Although Winter testified that the problem about employees attending school had occurred only at the Fairfield location, it appears that he made this announcement to all the employees.

[5] G.C. Exh. 3.

[6] Ward also testified that he was not told in the 1980 contract negotiations that an employee could refuse to attend school for any reason and the Company could do nothing about it.

November 2, 1981, he reported to work as usual and he told his supervisors, Mike Sauser and Ralph Gialetta, that he could not attend school due to "personal reasons." Sauser and Gialetta told Sorrentino to begin work while they ascertained what to do and about 11 a.m. on November 2, 1981, he was advised that he ws suspended without pay. Sorrentino, on either November 2 or 3, 1981, spoke to Ward and Kmon about the suspension and on November 3, 1981, a grievance was filed about the suspension by Ward. According to Ward, at the time this grievance was filed Sorrentino explained that his refusal to attend school was due to his fear for the safety of his family. Ward urged Sorrentino to discuss this problem with the Company but Sorrentino did not do so.[7] When Ward filed the grievance about the suspension with Sauser he was told that Sorrentino had been suspended for just cause.[8] Ward did not communicate to the Company what Sorrentino had told him about his fears for his family's safety. Ward testified that at this point he told Kmon about the Company's rejection of the grievance and Kmon stated that he would contact the Company to discuss the matter. It does not appear that Ward explained to Kmon the reason Sorrentino had given for refusing to attend school. On November 3, 1981, Sorrentino was discharged.

Kmon testified that he received a call from Ward who told him that Sorrentino had been suspended for refusing to attend school. Kmon claimed that he told Ward to file a grievance. Kmon then spoke with Sorrentino in an effort to ascertain the reason for Sorrentino's failure to attend school but Sorrentino refused to say anything but that his refusal was based on personal reasons.[9] Kmon, nevertheless, spoke with Winter who told him the action taken by the Company[10] was due to Sorrentino's refusal to attend school and his failure to supply a legitimate reason for his refusal to attend. Kmon claimed that he attempted on several occasions to have Sorrentino reinstated but without success. According to Kmon, he did not file for arbitration because Sorrentino had not provided a reason for the refusal to attend school and he had been warned in August 1981 about a similar refusal. Kmon testified that he, therefore, did not have the grounds to pursue the matter to arbitration. Winter confirmed that Kmon had contacted him concerning the grievance filed about the suspension and had asked him to reconsider the matter but he had refused to do so because Sorrentino failed to supply an explanation for his refusal to attend school.

This record contains several versions concerning what could happen if an employee refused to attend school without a legitimate reason. The contract, in section 14–B under the article relating to the seniority provisions, states that an employee who continually refused to attend school without a legitimate reason would be subject to a layoff, notwithstanding his seniority, in the event a layoff was necessary. Kmon testified that section 14–B was not concerned with the discipline the Company could impose in the event of such a refusal, it related only to what would happen to an employee's seniority rights. However, as noted, he did admit the last part of section 14–B was added to induce employees to attend school. It was Kmon's testimony that the Company always had the right to discipline, including the right to discharge, any employee who refused to attend school without a legitimate reason under the general provisions of the contract, apparently section 45. Ward testified that it was his opinion, and he relayed this to Sorrentino, that the Company could not discharge an employee for continually refusing to attend school without a legitimate reason but such an employee would lose his seniority rights in the event of a layoff. Ward also testified that, if everyone in the department had been trained, and an employee still refused to attend school, he could be discharged. Winter, as set forth above, viewed the part of section 14–B that referred to loss of seniority in the event of a layoff as a disciplinary measure. However, he also testified that the Company always had the right to discharge an employee who refused to attend school without providing a legitimate excuse for his refusal.[11]

V. DISCUSSION

The Union contends that Ward did not have specific, implied, or apparent authority to interpret the contract and, therefore, he was not an agent for the Union when he advised Sorrentino that he could not be discharged if he failed to attend school. The record does not support that position.

Ward was and had been for some time the shop steward at the Long Island City facility where Sorrentino was located. He was the Union's chief spokesman at that facility and in that role he discussed employee grievances with management. At times, in order to decide whether there was a grievable matter, he interpreted the contract. It was Ward, according to his testimony, who made the initial determination to file a grievance about Sorrentino's suspension.[12] In addition to these duties, Ward, as a union representative, participated in contract negotiations, including the negotiations for the 1980–1983 contract which contained the section 14–B provision. That section was the subject of much discussion during those negotiations, according to the testimony of all the witnesses. Ward not only participated in the negotiations, he also executed the contract as the Union's representative. The record fails to disclose that the Union had rejected any of those prior actions by Ward on the ground that they were unauthorized.

The Act in Section 2(13) provides:

[7] Sorrentino did not testify that he told this to Ward.

[8] Sorrentino testified that he had been told that the only acceptable reason was an illness in the family and he, therefore, did not believe his reason would be acceptable.

[9] It appears that at this point Kmon was talking about the discharge.

[10] Kmon stated that he had urged Sorrentino on numerous occasions to disclose the reason for his refusal but Sorrentino refused to explain.

[11] Kmon testified that if Sorrentino had advised him that his refusal to attend school was due to concern for the safety of his family, he would have submitted the matter to the arbitration proceedings provided for in the contract. Winter claimed that had the Company been aware of Sorrentino's reasons for refusing to attend school, it would have considered the reason to be a legitimate one and the Company would not have imposed the penalty it did.

[12] A further indication of Ward's belief that the only penalty for failure to attend school was a loss of seniority rights.

> In determining whether any person in acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board in an early case, *Longshoremen Local 6 (Sunset Line Co.)*, 79 NLRB 1487, 1509 (1948), quoting Senator Taft, held that Section 2(13) was enacted to restore the common law rules of agency to matters arising under the Act. The Board utilizing language from the Restatement on Agency stated as follows:

> A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area. . . .

The Board, in a recent case, reiterated its position that common law rules of agency apply in matters arising under the Act.[13]

In applying the common law rules of agency the Board has held a steward to be an agent of the union. Thus, in *Carpenters Local 2067 (AGC of America)*, 166 NLRB 532, 538–541 (1967), the Board described the role of the steward:

> A steward is the first union representative the members look to, and the man from whom they take their cues insofar as union policy is concerned. When a labor dispute arises on the job; he is expected to know both their rights and responsibilities under the contract between the union and their employer and their rights and responsibilities as union members. This places the steward in a position where he carries a duty both to the union and its members and to the contracting employer to exercise great care to see that he carries out those duties in a manner commensurate with such responsibility. [Id. at 504.]

Although there was no evidence of a written or verbal limitation on Ward's role as steward, the Union maintains that his role was limited to the handling of grievance matters and that he did not have the authority to interpret the contract. However, the contractual provisions relating to the grievance procedure provide that when a dispute exists as to the interpretation or application of the contract the shop steward, at the employee's request, may assist the employee during the first stages of the grievance procedure. Implicit in the statement is that the steward, in processing the grievance, will interpret the contract. Moreover, even without those provisions it is evident from language quoted in *AGC of America*, supra, that the Board does not view the role of the steward to be of such a limited nature. Rather, the Board views it to be the steward's responsibility to know the terms of the contract and to instruct the employees as to their rights and obligations under contract in order to protect the employee's employment status. In the instant case Sorrentino was entitled to seek advice from Ward and Ward had the responsibility to inform him of the penalty he could incur if he failed to attend school and did not provide a satisfactory explanation.[14] However, assuming that Ward's role was limited to handling grievance matters, as the Union contends, I would find that Ward, in discussing potential disciplinary measures with Sorrentino, was acting as an agent within that limited role. In sum, whether Ward's role as steward encompassed responsibilities described by the Board or was more limited as contended by the Union, it is evident that Ward was the agent of the Union when he advised Sorrentino of the possible discipline he faced if he failed to attend school.[15]

Respondent has cited numerous cases to support its argument that it cannot be considered to have breached its duty of fair representation absent a showing that its conduct was arbitrary, discriminatory, or in bad faith. Although Respondent has used the above language to describe the criteria to be used in determining whether it has violated the Act, the real thrust of its argument is that it cannot be found to have violated the Act because it did not act or fail to act because of any animus it had toward Sorrentino. If animus to Sorrentino were the standard to be utilized in determining whether a union's conduct violated the Act, then the Union would be justified in its position that it has not done so. This record is devoid of any evidence that the Union's action, in modifying its contract without notification and/or by providing misleading information to Sorrentino, was caused by any hostility the Union had to Sorrentino. However, hostility to Sorrentino is not the sole criterion to be used in determining whether a union has breached its duty to deal fairly with the employees it represents. In *Electrical Workers IBEW v. Foust*, 442 U.S. 42, 46 (1979), the Court stated the following:

> This Court first recognized the statutory duty of fair representation in *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), a case arising under the Railway Labor Act. *Steele* held that when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly.

This concept that a union has the responsibility to deal fairly with employees because its representative status has placed it in a unique position *vis-a-vis* the employee is stated also in *Electrical Workers IUE Local 801*, and its

[13] *Plumbers Local 513 (Master Plumbers)*, 264 NLRB 415 (1982).

[14] This is particularly true in the instant case, when one considers that Ward helped negotiate the provisions of sec. 14–B.

[15] *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528 (1982), and cases cited therein.

companion case, *General Motors Corp.*, 307 F.2d 679, 683 (D.C. Cir. 1962). Thus the court held:

> Among the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of unions in their dealings with employees. See *NLRB v. International Woodworkers*, 264 F.2d 649, 657 (9th Cir.) cert. denied 361 U.S. 816, 80 S.Ct. 546, L.Ed. 2d 63 (1959). The requirement of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power vested in the union with respect to the individual. See *NLRB v. International Woodworkers, supra.*

The Board expressed a similar perception that a union's exclusive power arising from its representative status obligated it to act fairly toward the employees it represents. Thus, in *Operating Engineers Local 324 (AGC of Michigan)*, 226 NLRB 587 (1976), the Board stated:

> Contrary to our colleague, we find that the Union's comprehensive and exclusive power and authority in this matter affecting Carlson's employment automatically obligated it to deal fairly with Carlson's request for job-referral information.

The Supreme Court recently reiterated the principle that a union owes a unique responsibility to the employee because of its representative status. Thus, in *Bowen v. U.S. Postal Service*, 103 S.Ct. 588 (1983), the Court stated, "By seeking and acquiring the exclusive right and power to speak for a group of employees the Union assumes a corresponding duty to discharge that duty faithfully, a duty which it owes to the employees whom it represents and on which the employer with whom it bargains may rely." The Court also stated, "For the union acts as the employee's exclusive representative in the grievance procedure as it does in virtually all matters involving the terms and conditions of employment."

The above-cited cases make clear that the union's obligation to the employee is not governed only by whether it acted from hostile reasons. In a recent case the Board found that the union had violated the duty placed on it as the representative of the employees when it failed to permit an employee to examine the union's referral records. The administrative law judge noted that there was a total lack of specific discrimination toward the member seeking the information but he, nevertheless, found a violation, and was upheld by the Board, based on the union's responsibility to the employees arising from its representative status. He concluded that the failure to supply the requested information constituted an arbitrary act as defined by the Supreme Court's decision in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).[16]

In *Miranda Fuel Co.*, 140 NLRB 181, 189 (1962), the Board, quoting from *General Motors Corp.*, supra, defined at least one responsibility owed to an employee by a union which arises from its representative status as follows:

> From the beginning of his employment, the union which can require his membership or command his discharge is therefore charged with an obligation of fair dealing which includes the duty to inform the employee of his rights and obligations so that the employee may take all necessary steps to protect his job.

It is evident from that language that a union's responsibility includes the responsibility of advising employees about conditions which will cause them to be discharged. In the instant case Sorrentino was provided with incorrect information by the Union which caused him to take the "wrong step" and thereby resulted in his loss of employment after 20 years. It is immaterial to the issues in the case whether Sorrentino, in failing to disclose to the Company his reasons for refusing to attend school, acted wisely. The Union has attempted to paint a picture of an insubordinate employee who placed himself, by his action, in a position where the Union could not help him. However, the Union, in attempting to paint such a picture, glosses over the real issue, which is that Sorrentino finds himself in his present situation because the Union failed to advise him properly concerning the penalty he faced if he did not attend school. It does not matter whether Sorrentino was advised incorrectly due to the change in the contract about which he was not advised or to the misinformation he received from Ward. In either situation the Union has failed in its responsibility to Sorrentino.

As noted above, I have found that the Union agreed to change the penalty that could be imposed for failing to attend school and failing to provide a satisfactory explanation for that refusal. It is undisputed that the employees were not notified by the Union about this change. In *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982), the Board found that the union had changed established hiring hall procedure and had failed to notify the employees. The Board found this failure to give timely notice of this significant change to be arbitrary and further found that the union had breached its duty to inform employees of information vital to their employment rights.

Assuming, however, that such a change did not occur I would find, nevertheless, that the Union breached its duty of fair representation. If the Union is correct and the memorandum of February 19, 1981, did not set forth a change in the existing penalty then Ward, one of the negotiators for the contract, deliberately misled Sorrentino. Although the concept of fiduciary responsibility had not been found in all aspects of a union's relationship to the employee it represents, the relationship is, as the court said in *General Motors Corp.*, supra, "in a sense fiduciary in nature." Certainly the union has a responsibility not to misinform an employee in such a vital matter as his employment rights. The Board, in *Retail Clerks Local 324 (Fed Mart Stores)*, 261 NLRB 1086 (1982), stated as follows: "Having agreed to resume processing Holt's grievance, Respondent engaged in unlawful arbi-

[16] *Bartenders Local 165 (Nevada Resort Assn.)*, 261 NLRB 420 (1982).

trary conduct by failing to meet its representative duty not to purposely misinform Holt about the manner in which the grievance would be handled. See *Local 417, Internatinal Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.*, 245 NLRB 527, 534 (1980); *Groves-Granite, a Joint Venture*, 229 NLRB 56, 63 (1977)." The above-cited cases involved misinformation given by the union to employees in matters relating to the processing of a grievance. However, the duty imposed on the union by the Board in *Miranda*, i.e., to inform employees of their rights and obligations, mandates that the union give employees the correct information so as to enable the employees to make an informed decision concerning their jobs.

Based on the above record, I find that the Union breached its duty of fair representation either by making a contractual modification without notification to the employees it represents or by failing to provide correct information so as to enable the employees to make proper determination respecting their job rights. This conduct violates Section 8(b)(1)(A) of the Act.[17]

CONCLUSIONS OF LAW

1. Toledo Scale, a Division of Reliance Electric Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Paint, Chemical, Clerical, Warehouse and Industrial Workers Union, Local 1310 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has violated Section 8(b)(1)(A) of the Act by failing to notify Anthony Sorrentino about a change in the contractual provisions and/or by misinforming him about the contractual provisions and thereby has acted arbitrarily and has breached its duty of fair representation.

4. The foregoing unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that the Union has violated the Act in certain respects, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As a result of the Union's failure to properly inform Anthony Sorrentino of his rights and duties, Sorrentino has been deprived of his employment with the Company. It is unlikely that the Company will reinstate Sorrentino. Accordingly, I shall recommend that the Union be required to find substantially equivalent employment for Sorrentino and make him whole for any loss of earnings he may have suffered because of the Union's unlawful conduct, by payment of a sum of money equal to that which he normally would have earned as wages, from November 3, 1981, to the date substantially equivalent employment is found for him less his net earnings during such period with backpay computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).[18]

[Recommended Order omitted from publication.]

[17] Subsequent to the close of the hearing counsel for the Union forwarded case for my consideration, *Steelworkers (Memphis Folding Stair v. NLRB*, 692 F.2d 1052 (7th Cir. 1982). In that case the court held that the Board must affirmatively establish the grievance was meritorious. Assuming that the Board adopts the court's position, that ruling would not control in the instant case. There, the employer discharged an employee who had failed to follow directions. The union's only fault was the manner in which it processed the grievance. Here, the Union caused the discharge either because it modified that contract or gave incorrect information.

[18] *Bowen v. Postal Service*, supra; *Retail Clerks Local 324 (Fed Mart Stores)*, supra.